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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STRAUS FAMILY CREAMERY, et	)	
al.	)	
	)	No. C02-1996 BZ
Plaintiffs,	)	
	)	<b>ORDER DENYING PLAINTIFFS'</b>
v.	)	<b>MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT AND GRANTING</b>
WILLIAM B. LYONS,	)	<b>DEFENDANT'S MOTION FOR</b>
	)	<b>SUMMARY JUDGMENT</b>
Defendant.	)	
_____	)	

Plaintiffs Straus Family Creamery, Inc. and Horizon Organic Holding Company, certified organic milk processors in Northern California, filed this action against defendant Secretary of the California Department of Food and Agriculture ("Secretary"), alleging that the milk pricing and stabilization program created by the Milk Stabilization Act, California Food and Agriculture Code sections 62061, et seq., and the Gonsalves Milk Pooling Act of 1967, California Food and Agriculture Code sections 62700, et seq., (collectively, the "Pooling Plan"), as applied to

1 plaintiffs violates their equal protection and substantive  
2 due process rights.<sup>1</sup> Plaintiffs also allege that the  
3 procedure for resolving plaintiffs' proposed amendment to  
4 the Pooling Plan violates their procedural due process  
5 rights. The parties filed cross-motions for summary  
6 judgment, which were heard on July 30, 2003.<sup>2</sup>

#### 7 **THE MILK REGULATORY SCHEME**

8 Since 1935, the milk industry in California has been  
9 regulated pursuant to the Milk Stabilization Act. Prior to  
10 1967, the Secretary set minimum prices for raw milk  
11 depending on the end-use of that milk. Under this system,  
12 raw milk used for fluid milk had the highest value in the  
13 marketplace and highest minimum price. Raw milk used for  
14 other products, such as cheese, had lower values and lower  
15 minimum prices. This tiered pricing structure contributed  
16 to the destabilization of the market for fluid milk as  
17 producers (or farmers) competed to sell their milk for use  
18 as fluid milk. See Cal. Food & Agric. Code § 62701  
19 (declaring that "unfair, unjust, destructive and  
20 demoralizing trade practices have appeared within this  
21 industry....").

22 To address deficiencies in this pricing scheme and to

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23  
24 <sup>1</sup> The parties have consented to the jurisdiction of a  
25 United States Magistrate Judge for all proceedings,  
including entry of a final judgment, pursuant to 28 U.S.C. §  
636(c).

26 <sup>2</sup> On August 28, 2003, I held a further hearing to  
27 receive evidence on a disputed issue of fact -- whether  
28 defendant considers organic production costs in setting  
minimum milk prices. I have issued separate findings which  
resolve that issue.

1 stabilize the milk market, the legislature enacted the  
2 Gonsalves Milk Pooling Act. Pooling reallocates money  
3 among processors of various dairy products to ensure  
4 constant supply of all those products. The current Pooling  
5 Plan implements that Act. A general description of the  
6 Pooling Plan appears in Ponderosa Dairy v. Lyons, 259 F.3d  
7 1148, 1151-52 (9th Cir. 2001) cert. granted, 123 S.Ct. 818  
8 (2003), judgment vacated on other grounds, 123 S.Ct. 2142  
9 (2003).

10 When the Pooling Act was passed in 1967, the milk  
11 industry was homogenous. Specialty niches have since  
12 appeared, the largest of which is organic milk. Other  
13 niches include high-protein milk, milk with lower bacteria  
14 counts and milk without growth hormones. Plaintiff Horizon  
15 is the leading marketer of organic dairy products in the  
16 United States and in the United Kingdom. It markets milk,  
17 cheese, butter and other dairy products throughout the  
18 United States. Plaintiff Straus is a family-owned  
19 corporation formed to process milk produced by the family's  
20 organic farm. Currently a regional marketer of milk,  
21 cheese, butter and yogurt, it is opening an ice cream  
22 facility and hopes to market its products nationally.  
23 While in the past ten years, the organic milk industry has  
24 grown significantly -- one estimate is 20% per year -- it  
25 occupies a small fraction of the entire milk industry. In  
26 1999, organic milk amounted to 0.12% of all the milk  
27 produced in California. Of California's approximately 2200  
28 dairy farmers, an estimated 13 are organic.

1        This lawsuit arises from perceived inequities in the  
2        current Pooling Plan, which plaintiffs allege violate their  
3        constitutional rights. These inequities are illustrated by  
4        a hypothetical I posed during the hearing. In the  
5        hypothetical, the milk market consisted of two end-  
6        products, fluid milk and cheese.<sup>3</sup> The pool price, the  
7        minimum price that processors (typically dairies) are  
8        obligated to pay to producers (or farmers) per  
9        hundredweight of raw milk, was \$13.00. The minimum  
10       classification price, or the amount for which the processor  
11       must account to the pool, was \$14.00 for fluid milk,  
12       whether conventional or organic, and \$12.00 for cheese  
13       milk, whether conventional or organic.<sup>4</sup> The producers'  
14       costs of production were \$12.00 for conventional milk and  
15       \$15.00 for organic milk. Finally, the contract price for  
16       organic raw milk, or the price organic producers demand  
17       because of higher production costs, was \$18.00.<sup>5</sup>

18       Based on these assumptions, the parties agreed that a  
19       conventional processor purchasing a hundredweight of milk  
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21       <sup>3</sup> In actuality, the milk market consists of five  
22       classes: Class 1 (fluid milk), Class 2 ("soft" dairy  
23       products), Class 3 (frozen dairy products), Class 4a  
24       (butter/powder) and Class 4b (cheese).

25       <sup>4</sup> The pool price is the weighted average of the five  
26       minimum classification prices.

27       <sup>5</sup> There is no dispute that unless organic processors  
28       were willing to pay a premium over the current pool price,  
29       producers would not convert to organic milk production  
30       because of the higher costs associated with organic  
31       production. Many of these costs are driven by the need to  
32       comply with the National Organic Program, 7 C.F.R. Part 205,  
33       et seq.

1 for fluid milk would pay \$13.00 (pool price) to the  
2 producer and \$1.00 to the pool (minimum class price less  
3 pool price). A conventional processor of cheese purchasing  
4 a hundredweight of milk would pay \$13.00 (pool price) to  
5 the producer and would receive \$1.00 from the pool (pool  
6 price less minimum class price).

7 The parties also agreed that an organic processor  
8 purchasing a hundredweight of milk for fluid milk would pay  
9 \$18 (contract price) to the producer and \$1 to the pool  
10 (minimum class price less pool price). An organic  
11 processor of cheese purchasing a hundredweight of milk  
12 would pay \$18 (contract price) to the producer and would  
13 receive \$1 from the pool (pool price less minimum class  
14 price). Because presently 90% of organic raw milk is used  
15 to produce fluid milk, the Pooling Plan causes plaintiffs  
16 to pay far more into the pool than they receive back from  
17 the pool. A plan that produces such a disparity,  
18 plaintiffs complain, is arbitrary and irrational.

19 There is no claim in this lawsuit that organic  
20 producers are entitled to a higher minimum price. Nor is  
21 there a claim by organic processors that the Pooling Plan  
22 somehow causes the organic milk market to not accommodate  
23 the high transaction prices they must pay for organic milk.  
24 Put another way, the relief plaintiffs seek could benefit  
25 them, but not necessarily the farmer or the consumer.

#### 26 **THE POOLING PLAN IS NOT UNCONSTITUTIONAL**

27 The issue before me is not whether there is a better  
28 way for California to regulate the organic milk industry,

1 such as by having a separate pool for organic milk. The  
2 issue is only whether there is a rational basis for the  
3 Pooling Plan. Equal protection and substantive due process  
4 challenges to a state regulatory scheme are reviewed under  
5 the rational basis test.<sup>6</sup> Plaintiffs' challenge fails  
6 because the Pooling Plan is rationally related to a  
7 legitimate government interest.<sup>7</sup> See Exxon Corp. v.  
8 Governor of Maryland, 437 U.S. 117, 124-25 (1978).  
9 Plaintiffs have not proven that the state's action was  
10 "clearly arbitrary and unreasonable, having no substantial  
11 relation to the public health, safety, morals or general  
12 welfare." Village of Euclid v. Ambler Realty Co., 272 U.S.  
13 365, 395 (1926).

14 There is no dispute that California has a legitimate  
15 interest in the health and welfare of its citizens who  
16 consume milk. However, plaintiffs contend that the means  
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18 <sup>6</sup> This is because organic milk processors are not a  
19 suspect class and the right to process milk is not a  
20 fundamental right. See e.g., Country Classic Dairies, Inc.  
v. Montana, 847 F.2d 593, 596 (9th Cir. 1988).

21 <sup>7</sup> The only reported case to have considered a  
22 similar constitutional challenge upheld the Northeast Dairy  
23 Compact's generally applicable "over-order" price (the  
24 minimum price paid to producers for milk) regulation as  
25 applied to organic milk handlers. See The Organic Cow, LLC  
v. Northeast Dairy Compact Commission, 46 F. Supp. 2d 298,  
26 306 (D. Vt. 1999) (denying the equal protection and due  
27 process challenges to the over-order price regulation and  
28 holding that the over-order price, which was used to  
maintain a region's economy by guaranteeing a minimum price  
to farmers, was a rational means to achieve the stated  
purpose of ensuring a stable supply of wholesome milk from  
businesses as an integral part of the region's economy, even  
though the over-order price did not recognize any difference  
in economics between conventionally and organically produced  
milk).

1 for carrying out this legitimate interest -- the Pooling  
2 Plan -- is unconstitutional as applied to them. As  
3 plaintiffs see it, the Pooling Plan has two principal  
4 purposes: to establish minimum prices so as to generate  
5 reasonable producer incomes and to eliminate unfair  
6 practices resulting from producers competing to obtain the  
7 "highest value" fluid milk contracts. Plaintiffs contend  
8 that it is arbitrary and irrational to apply the Pooling  
9 Plan to organic milk processors because the Plan does not  
10 generate reasonable incomes for organic producers, only for  
11 conventional producers. This is because the minimum price  
12 guaranteed to all producers falls below the cost of organic  
13 milk production; indeed plaintiffs claim that cost of  
14 production is not a factor in setting the minimum price.  
15 Plaintiffs also contend that it is arbitrary and irrational  
16 to require organic processors to contribute to a pool that,  
17 they assert, is designed to eliminate competition for  
18 conventional fluid milk sales and has no impact on sales of  
19 organic milk to organic processors.

20 The basic flaw in plaintiffs' arguments is that they  
21 confuse the overall purpose of the Pooling Plan with two of  
22 the means of achieving that purpose. The overriding  
23 purpose of the Pooling Plan is to protect consumers by  
24 protecting and stabilizing the quantity and quality of the  
25 milk and milk products they consume. See Golden Cheese Co.  
26 of Cal. v. Voss, 230 Cal. App. 3d 547, 562 (1991); E.M.  
27 Consumer Corp. v. C.B. Christensen, 47 Cal. App. 3d 642,  
28 647 (1975) (finding that "the all pervasive end of the

1 [Milk Stabilization] act is that 'the people shall be able  
2 to purchase milk at the lowest price at which enough  
3 distributors operating with average efficiency will be able  
4 to do business at a reasonable profit so as to supply the  
5 demand of all the consumers in the marketing area.'")  
6 (quoting Misasi v. Jacobsen, 55 Cal.2d 303, 309 (1961),  
7 citing Challenge Cream etc. Ass'n v. Parker, 23 Cal. 2d  
8 137, 141-42 (1943)); see also Cal. Food & Agric. Code §§  
9 61801 (the Milk Stabilization Act was enacted for the  
10 purpose of "protecting the health and welfare of the people  
11 of this state"); 62700 (the Gonsalves Milk Pooling Act was  
12 enacted for the purpose of "protecting the health and  
13 welfare of the people of this state"); 62702 (declaring  
14 that the purposes of the Gonsalves Milk Pooling Act are to  
15 "develop and maintain satisfactory marketing conditions and  
16 bring about and maintain a reasonable amount of stability  
17 and prosperity in the production of fluid milk and fluid  
18 cream" and to "insure to consumers within California an  
19 adequate and continuous supply of pure, fresh and wholesome  
20 milk at fair and reasonable prices").

21 On the whole, the Pooling Plan appears to meet its  
22 goal of consumer protection through stabilization of the  
23 market. Judicial segregation of organic milk processors  
24 from the overall pooling plan could tend to destabilize the  
25 milk market and fragment an industry that the legislature  
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1 has seen fit to treat as a whole.<sup>8</sup> At the hearing,  
2 plaintiffs did not dispute that if a processor,  
3 conventional or organic, used equal amounts of raw milk for  
4 fluid milk and for cheese, the amounts the processor paid  
5 to the pool and received from the pool would be a wash.  
6 The parties also agreed that all producers receive at least  
7 a minimum price for their milk, regardless of consumer  
8 market conditions. While the minimum price currently is  
9 less than an organic producer's costs of production, it  
10 still provides such producers with a safety net. It is  
11 also likely that as the organic milk industry grows, the  
12 contract price and the costs of production will fall in the  
13 face of increased competition and volume.

14 Exemption from the pool of organic processors is a  
15 slippery slope that could foster market instability. This  
16 is true even though the organic milk industry currently  
17 accounts for a small percentage of the entire milk market.  
18 Other specialty milk processors, such as those that process  
19 milk without growth hormones, could advance many of the  
20 same arguments that plaintiffs make here in an effort to  
21 obtain an exemption from the pool. Such instability  
22 appears to have troubled the Legislature as it considered  
23 proposals to exempt other categories of milk from leaving  
24 the Pool. See, e.g., Stats. 1996 c. 759 (S.B. 1885);  
25 Assembly Floor Analysis SB 1885

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26  
27 <sup>8</sup> It bears repeating that no claim is advanced on  
28 behalf of organic producers, who among other things, always  
have the option of selling organic raw milk to conventional  
processors if there is a surplus of organic raw milk.

([http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb\\_1851-1900/sb\\_1885\\_cfa\\_960820\\_205556\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_1851-1900/sb_1885_cfa_960820_205556_asm_floor.html)) ("**Continued degradation of the pool could ultimately lead to the demise of the pooling system** as established by California producers.") (emphasis added); Assembly on Agriculture, May 12, 1999 Bill Analysis, AB 1470 ([http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_1451-1500/ab\\_1470\\_cfa\\_19990520\\_102956\\_asm\\_com.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1451-1500/ab_1470_cfa_19990520_102956_asm_com.html)) ("**By taking any milk out of the pool system the pool suffers** and therefore, all producers in the pool suffer. In order to maintain the integrity of the pool, SB 1885 was passed ... to prevent producers from jumping in and out of the pool.") (emphasis added).

Moreover, separation of specialty groups from the Pooling Plan is a matter for the legislature, not the courts. See Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1104 (S.D. Cal. 1999) ("[T]he Court does not write laws for the State of California, nor does it mandate new regulatory programs. That is the role of the Legislature, and of state agencies should the Legislature properly delegate such authority. The Court's only role is to decide whether the means used to regulate the activities in question are constitutionally permissible."). This is especially true here where the statutory scheme does not appear to provide for separate stabilization plans or pooling plans based on any criteria other than geography. See Food & Agric. Code §§ 61830, 62064, 62704, 62706.

Relying heavily on Cornwell, plaintiffs claim that

1 their equal protection rights have been violated because  
2 defendant is treating organic processors, who are subject  
3 to organic food laws, in the same manner as conventional  
4 processors, who are not. See Cornwell, 80 F. Supp. 2d at  
5 1103 ("Sometimes the grossest discrimination can lie in  
6 treating things that are different as though they were  
7 exactly alike."). However, this case is unlike Cornwell,  
8 in which the district court found that the State's  
9 application of the cosmetology licensing requirements to  
10 plaintiff, a hair braider, was irrational because the  
11 cosmetology curriculum did not teach braiding and required  
12 hair braiders to learn too many irrelevant or harmful  
13 tasks.

14 Here, organic milk processors are part of the milk  
15 industry and their activities substantially overlap those  
16 of conventional milk processors. While they are subject to  
17 additional regulations, organic milk processors are not so  
18 different from other milk processors that it would be  
19 irrational to apply the pooling plan to them. Plaintiffs'  
20 emphatic argument that organic milk products and  
21 conventional milk products are two completely separate  
22 commodities is not persuasive, especially since, in times  
23 of surplus, organic milk producers can and do sell to  
24 conventional processors.

25 Moreover, unlike the cosmetology requirements, the  
26 Pooling Plan is flexible. The formulas used by defendant  
27 to set the minimum classification prices contain elements  
28 which can be adjusted to account for increased costs of

1 production. As the number of organic farms increase and  
2 their higher costs are captured for inclusion in the  
3 formulas, the industry's overall production costs will  
4 rise, and the Secretary can consider those increased costs  
5 in setting the minimum prices. In addition, unlike the  
6 instant case, Cornwell involved a licensing scheme in which  
7 there is no risk of destabilizing an entire regulatory  
8 scheme if certain individuals or groups are excluded.

9 At bottom, plaintiffs' argument is based on their  
10 perception of unfairness in the system. Because the  
11 organic milk industry is in its infancy, the pool prices  
12 are less than the costs of organic farming. However,  
13 because the system used by the Secretary to establish  
14 minimum and pool prices is flexible, as discussed above,  
15 these prices may well increase as the organic industry  
16 grows and its higher costs of production are included in  
17 the price setting formulas. Likewise, as the organic  
18 industry moves into production of cheese and products other  
19 than milk, the imbalance between plaintiffs' pool debits  
20 and credits should diminish. And should the organic  
21 industry develop to the point where it could become subject  
22 to the sort of unfair practices the milk industry  
23 experienced prior to the enactment of the milk regulatory  
24 laws, plaintiffs have not claimed that the Pooling Plan  
25 would not serve to stabilize the organic milk industry as  
26 well. A perception of unfairness alone, especially where,  
27 as here, it may be short term, does not rise to the level  
28 of a constitutional violation.

1           **THE DUE PROCESS CHALLENGE IS NOT RIPE FOR REVIEW**

2           Plaintiffs also contend that defendant's application  
3 to plaintiffs of the procedure contained in California Food  
4 and Agriculture Code section 62717(b) regarding amendments  
5 to the Pooling Plan violates their procedural due process  
6 rights. See Cal. Food & Agric. Code § 62717(b) ("The  
7 director may amend the plan ... if he finds that the  
8 amendment is necessary to effectuate the purposes of this  
9 Chapter....The director may make substantive amendments to  
10 the plan only if producers assent to the proposed  
11 amendments at a referendum ....").

12           In 2000, plaintiffs proposed an amendment to the  
13 Pooling Plan that would establish an alternative discounted  
14 pool obligation for organic processors. See Declaration of  
15 Aviva Cuyler Ex. L. After a March 2001 public hearing in  
16 which organic and conventional milk producers and  
17 processors participated, orally and in writing, the  
18 Secretary found that "...the current Milk Pooling Plan for  
19 Market Milk (Pool Plan) continues to effectuate the  
20 declared purposes of the California Food and Agricultural  
21 Code." Cuyler Decl. at Ex. C at 2. The Secretary also  
22 recognized that the proposed amendment would likely be  
23 rejected by a referendum because significantly more  
24 producers were opposed to the amendment than supported it.  
25 Id. at 11.

26           Plaintiffs argue that applying the referendum  
27 requirement to their proposed amendment violates their  
28 procedural due process rights because the vast majority of

1 producers statewide are conventional farmers with interests  
2 adverse to plaintiffs.<sup>9</sup> However, this claim is not ripe.  
3 Plaintiffs do not seek a court order requiring the  
4 Secretary to adopt plaintiffs' proposed amendment or to  
5 schedule a referendum on plaintiffs' proposed amendment.  
6 Because the Secretary did not find that the proposed  
7 amendment was necessary to effectuate the purposes of the  
8 laws, he had no obligation to submit it to a referendum. I  
9 decline to speculate on how the Secretary would have  
10 proceeded had he determined that the Pooling Plan needed to  
11 be changed, or on the outcome of any referendum on an  
12 amendment found by the Secretary to be necessary to  
13 effectuate the purposes of the milk regulatory laws.

14 Accordingly, it is **HEREBY ORDERED** that plaintiffs'  
15 motion for summary judgment is **DENIED** and that defendant's  
16 motion for summary judgment is **GRANTED**.<sup>10</sup>

17  
18 Dated: September 3, 2003

19  
20 /s/ Bernard Zimmerman  
21 Bernard Zimmerman  
22 United States Magistrate Judge

23  
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25 <sup>9</sup> Similar regulatory referendum procedures have been  
26 upheld against constitutional challenges, even though the  
27 voting parties often have interests adverse to the party  
28 behind the referendum. See, e.g., Sequoia Orange Co. v.  
Yeutter, 973 F.2d 752, 759 (9th Cir. 1992).

<sup>10</sup> Defendant filed objections to some of plaintiffs'  
evidence. All of defendant's objections are **OVERRULED**.